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SUPREME COURT, U. S.

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No. 15

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. Insurance Company,
Appellee.

Appeal From the Supreme Court of Texas

REPLY BRIEF OF APPELLANT REPUBLIC NATIONAL BANK

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No. 91

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OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. Insurance Company,
Appellee.

Appeal From the Supreme Court of Texas

REPLY BRIEF OF APPELLANT REPUBLIC NATIONAL BANK

Appellant, Republic National Bank of Dallas, files this Brief in reply to the Brief filed previously by Appellee. Appellant has subdivided its Reply Brief in much the same way Appellee subdivided his Brief.

I. THE JURISDICTIONAL ISSUE

In this Appellant's Jurisdictional Statement (pp. 2-6), its Brief in Opposition to Appellee's Motion to Dismiss, and its

previous Brief (pp. 9-16), it has set out the reasons why this case meets the jurisdictional requirements of the Supreme Court, to which reference is herein made. The essence of Appellant's position, however, is that unless Appellant can have Supreme Court review at this time it will be irreparably deprived of an important federal venue right. None of Appellee's arguments directly meets this contention.

Appellee cites *Montgomery Building and Construction Trades Council v. Ledbetter Erection Co., 344 U. S. 178 (1952)*, a case which this Appellant discussed in some detail in its Brief in Opposition to Appellee's Motion to Dismiss (pp. 2-4), and in its previous Brief (pp. 11-13). The *Montgomery* case involved appeal of a temporary injunction; jurisdiction was denied. Appellant has previously shown at some length how the present case differs from a temporary injunction. Appellee cites the *Montgomery* case in one other connection, however, which deserves some discussion here. Appellee claims that Appellants have argued that if review is not granted now and the case goes on to trial in violation of *12 U. S. C. §94*, the question of venue will then be "moot." Appellee cites *Montgomery* to show that a question's becoming "moot" is not persuasive in establishing Supreme Court jurisdiction.

Appellee has not properly restated Appellant's argument. Appellant has never claimed the venue issue would become "moot". Most questions involved in litigation are in danger of becoming moot if the proceedings take a long time. Appellant agrees that the possibility of a question's becoming moot because of the time required for litigation is not a valid

basis for establishing Supreme Court jurisdiction. But that is not what Appellant has said. Appellant has argued, instead, that if review is not now granted, Appellant *will* be irreparably deprived of its federal venue right at the moment trial on the merits begins outside Appellant's home county. Involved here is a *certainty* of Appellant's being irreparably injured, rather than a vague possibility that changed conditions will render the question moot. This is a far different situation from that suggested in *Montgomery*, where it was apparently contended that the picketing there involved might be frustrated and the case rendered moot if Appellant had to wait for a permanent decree before appealing.

Appellee also suggests—citing *Republic Natural Gas Co. v. State of Oklahoma*, *334 U. S. 62 (1948)*—that should Appellants be successful on the merits they "would undoubtedly acquiesce in the original determination of the venue issue". The situation involved in *Republic Natural Gas* is quite different from the present case. *Republic Natural Gas* involved the appeal of an Oklahoma State Corporation Commission order allocating the taking of gas between two producers. Appeal was on due process and equal protection grounds. The Oklahoma decree left the matter of compensation for the gas to be decided later. The Supreme Court—in declining jurisdiction—indicated that a favorable decision on compensation might cause the complaining party to acquiesce in its constitutional protests. *Republic Natural Gas*, then, involved a future state determination *of the very question involved in the appeal*, a favorable determination of which might cause the aggrieved party to acquiesce. In our

case there is no future state determination of the venue issue available before Appellant's venue right has been irretrievably lost.

Appellee then restates the well-known rule that the Supreme Court is not bound by state practice in determining questions of appellate jurisdiction. Appellant has never submitted this case on the basis of Texas practice. It *has* submitted this case on the basis of certain *facts*. These facts are mostly derived from Texas practice simply because this case arose through Texas courts. But it is the *facts* on which this case is submitted, not any name or characterization applied by the courts of Texas. These facts have been set out previously, but they can be summarized as follows:

1. There has been a state determination depriving Appellants of a valuable federal venue right.

2. Appellants have exhausted all available means to secure a favorable ruling on the federal venue question in the state courts.

3. The state determination involved only the venue question, and a lengthy, complex and expensive state proceeding will be based on that determination.

4. The state courts will make no further determination of the venue issue.

5. If the United States Supreme Court does not grant review at this time, Appellant will be forced to trial in violation of its federal venue right and thus irreparably deprived of that right no matter what the outcome of the case on the merits might be.

These facts make out a case for review under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949), and *Republic Natural Gas Co. v. State of Oklahoma*, *supra*, where the Court said (at 334 U. S. 68):

> "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, *because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing.*" [Emphasis supplied.]

This case involves an important question for national banks everywhere. Research has revealed an almost shameful flouting of *12 U. S. C. §94*'s venue rules by the state courts. At best there is a serious conflict of authority. This question needs a decision, and the present case in its present context is a suitable one for deciding it.

II. THE EFFECT OF 12 U. S. C. §94

A. Difficulty in applying 12 U. S. C. §94 in other situations is not a basis for holding it inapplicable here.

Appellee's first contention is that Congress "certainly did not intend" by enacting §94's predecessor to "disrupt" the established jurisprudence of the states. Appellant cannot agree with this. Appellant submits that Congress *did* intend to *regulate* the jurisdiction of state courts to hear national bank cases. This intent is clear from a reading of §94: proceedings against a national bank may be had "* * * in any State, county, or municipal court in the county or city in which said association is located * * *". Appellant has shown in its previous Brief (pp. 21-26) that this regulatory intent

is the result of a long-standing Congressional policy that national banks will be treated uniformly the country over, and will not be unduly interfered with by the states. If Appellee wishes to interpret this venue requirement as a "disruption" of state power he may do so, but the United States Supreme Court, in decision after decision, has preferred to uphold federal regulation of national banks, even when that regulation conflicted with state law. See, for example, *McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. 1824); Farmers' and Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875); Van Reed v. People's National Bank, 198 U. S. 554 (1905).* The venue requirement in question should likewise be upheld.

In an effort to bolster this argument, Appellee points out that §94, if construed mandatorily, may present some difficulties in implementation. One of Appellee's suggested difficulties involves the interplay of Texas venue statutes and the federal. He points out various instances where the two conflict. A ready answer to this has been provided by the decision of the Texas Supreme Court in this case (R. 369, *341 S. W. 2d 164*): if Texas venue statutes conflict with the federal statutes, the state statutes must yield. The remedy of Texas and its courts is not to ask the federal government to render its venue statute meaningless; it is—if necessary—to accommodate the Texas venue statutes to the federal statute. If in the 87 years since §94's predecessor was enacted Texas has been unable or unwilling to bring its laws into harmony with federal law, that is no reason at this late

date to ask that the federal government abolish its venue rules.

Appellee's second suggested difficulty involves what happens when national banks located in different counties are indispensable parties to a lawsuit. This situation may or may not have been contemplated when §94's predecessor was enacted. At any rate, that problem is not involved in this case. The only two national banks that are parties here are located in the same county.

Appellant answers this "difficulty of application" argument in two ways. First, the decision of this case should be limited to its facts. Problems which might arise in other fact situations should not be allowed to prevent the application of a statute to a fact situation which that statute is clearly designed to cover. Other fact situations should be decided when they arise.

Second, a statute's failing to cover certain fact situations is no basis for asking the courts to usurp the legislature's function and declare the whole statute invalid. "A casus omissus does not justify judicial legislation," said the United States Supreme Court in *Ebert v. Poston, 266 U. S. 548, 554 (1925)*. To use an analogy, there are situations under the usual federal venue rules when no federal court has venue to hear a case, as, for example, in a transitory diversity action having two indispensable plaintiffs (individuals) residing in different judicial districts, and two indispensable defendants (individuals) residing in different states. *28 U. S. C. §1391 (a), §1392(a); see 1 Moore, Federal Practice, §0.143[1]*. That fact does not give the federal courts the right to aban-

don all federal venue rules, and they assuredly have not. If Congress, in the future, shall choose to correct that situation, well and good. In the meantime, the Courts will abide by the venue rules as they stand. The same considerations apply in our case.

Appellee has cited a number of cases—state and federal—which he claims support his position that difficulty of application renders §94 nugatory. In so doing he has grossly misrepresented many of the authorities he has cited, as well as the number of cases supporting Appellant's position.

Two state cases cited by Appellee in support of a permissive construction of §94 actually indicate that §94 is mandatory. They are: *Chaffee v. Glens Falls National Bank and Trust Company, 204 Misc. 181, 123 N. Y. S. 2d 635 (Sup. Ct. 1953), affd. 283 App. Div. 694, 128 N. Y. S. 2d 539 (1954), leave to appeal to Ct. App. den., 283 App. Div. 793, 129 N. Y. S. 2d (1954)*, and *County of Okeechobee v. Florida National Bank, 112 Fla. 309, 150 So. 124 (1933)*. Although both indicate §94 is mandatory, each allows suit in another county for reasons not existing in the present case (waiver in *Okeechobee*, the state-wide jurisdiction of New York's Supreme Court in *Glens Falls*). Again, Appellee in setting out the state cases supporting Appellant's position lists only two. Significantly he fails to list a number of others: *Crocker v. Marine National Bank, 101 Mass. 240, 3 Am. Rep. 336 (1869); Raiola v. Los Angeles First National Trust and Savings Bank, 133 Misc. 630, 233 N. Y. S. 301 (City Ct. N. Y. 1929); Crofoot v. Giannini, 196 Misc. 213, 92 N. Y. S. 2d 191 (Sup. Ct. 1949); Rabinowitz v.*

Kaiser-Frazer Corp., 198 Misc. 312, 96 N. Y. S. 2d 638 (Sup. Ct. 1950); Burns v. Northwestern National Bank of Minneapolis, 65 N. D. 473, 260 N. W. 253 (1935), and *Zarbell v. Bank of America, 52 Wash. 2d 549, 327 P. 2d 436 (1958)*. These cases are discussed in Appellant's previous Brief (pp. 27-33), along with the federal cases not mentioned by Appellee.

Appellee has attempted to overcome some of the federal cases holding against his position by misconstruing them. *First National Bank v. Fellows, ex rel. Union Trust Co., 244 U. S. 416 (1917)*, does *not* stand for the proposition that a national bank may be sued outside its county. A national bank can waive its venue rights, as demonstrated by *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, and that is certainly what the defendant national bank did in *Fellows*. There is no intimation in the *Fellows* opinion that the defendant bank ever raised the venue issue. Appellee also cites *Casey v. Adams, 102 U. S. 66 (1880)*; that case is discussed *infra*, p. 14, also in Appellant's previous Brief (pp. 33-35). Finally, the *Morgan* case, *supra*, does *not* stand for the proposition that the venue requirements of §94's predecessor apply only in usury cases, as Appellee indicates the Supreme Court "could very well have" decided. *Morgan* was a usury case, but nowhere in the opinion is it even suggested that the venue rules apply only to usury cases (see discussion in this Appellant's previous Brief, pp. 42-43).

Appellant submits that Appellee's "difficulty of application" argument cannot stand, and that the authority given by Appellee in support of it does not support it.

B. Appellee's arguments based on Congressional intent and repeal by implication are totally ineffective because Appellee has failed to differentiate between jurisdiction and venue.

Before discussing Appellee's next two points, it is necessary to clear up some confusion between *jurisdiction* and *venue*. It is elementary that jurisdiction involves the power of a court to hear a case, while venue concerns the proper locale in which a case should be tried. A defect in jurisdiction cannot be waived, while a defect in venue is a personal privilege which may be waived. See *Neirbo v. Bethlehem Shipbuilding Corporation, 308 U. S. 165 (1939)*; also *Federal Underwriters Exchange v. Pugh, 141 Tex. 539, 174 S. W. 2d 598 (1943); Nelson v. Thompson, 64 S. W. 2d 373 (Tex. Civ. App. 1933, error dis.)*, and *Lewright v. Reese, 223 S. W. 270 (Tex. Civ. App. 1920, error ref.)*, indicating that Texas accedes to the usual rules in this area.

The problem here is one of venue, *not* one of jurisdiction. The Supreme Court of Texas has admitted as much (R. 369, *341 S. W. 2d 164*). We are dealing with that portion of *12 U. S. C. §94* relating to *where* national bank cases are to be tried in state courts. The United States Supreme Court has already by implication construed this aspect of §94 as one of venue. Had this problem involved jurisdiction, the order in *First National Bank of Charlotte v. Morgan, supra*, would have been to dismiss the action as having been tried in a forum lacking jurisdiction. Instead, the national bank was held to have *waived* its venue rights by not having raised them.

Appellee has contended, based on *Bank of the United States v. Deveaux, 5 Cranch 85 (U. S. 1809)*, that Congress in enacting §94's predecessor was unnecessarily trying to reinforce the jurisdiction of state courts to hear national bank cases. Appellee continues that §94's predecessor being unnecessary, §94 has no effect.

Congress may or may not have intended to concern itself with state court jurisdiction when it enacted §94's predecessor; whether it did is largely academic in a case dealing solely with venue. What Congress *certainly* did was to enact a law covering venue. That law is clear from §94's language, and must be followed.

All that Appellee has offered to support his "unnecessary enactment" theory is his statement (p. 25) that the statute "must necessarily have been the result of" the *Deveaux* case. More than that is needed to impute to Congress an unnecessary act. Again, even if §94's predecessor did duplicate previous enactments as to jurisdiction, is the result necessarily to invalidate §94, as Appellee contends? In *United States v. Borden Co., 308 U. S. 188, 198 (1939)*, the Supreme Court said, "When there are two acts upon the same subject, the rule is to give effect to both if possible." Thus, even if Appellee's tenuous theory as to Congress' intent were correct, the result would not be to invalidate §94, and certainly not to invalidate it as to venue.

Appellee's argument in 1962 that Congress in 1875 "must have" been influenced by an 1809 case to legislate unnecessarily as to jurisdiction, and that this "unnecessary" act

now renders the statute invalid as to venue as well is highly unsound.

Appellee also says §94 has been repealed. Appellee states that the proviso in the Act of July 12, 1882, ch. 290, sec. 4, 22 Stat. 163, was responsible for its repeal. The 1882 proviso reads as follows:

> "* * * provided, however, that the jurisdiction for suits hereinafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Associations may be doing business when such suits may be begun; * * *."

Appellant discussed in some detail the statutory history and purpose of this proviso in its previous Brief (pp. 37-39), to which reference is herein made. It is, however, necessary to reiterate the interpretation which the United States Supreme Court has twice put on the quoted proviso. In *Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778 (1887)*, the 1882 act was interpreted as intended to take away from national banks their previously recognized right to go into federal courts solely on the basis of their being federal instrumentalities, and to put them—for purposes of federal court jurisdiction—on the same footing as state banks. In *Continental National Bank v. Buford, 191 U. S. 119 (1903)*, the 1882 act was again interpreted, this time in connection with a later enactment of similar character, the

Act of August 13, 1888, ch. 866, §4, 25 Stat. 436. The Court said (at *191 U. S. 124*):

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by and exercised their powers under Acts of Congress. *No other purpose can be imputed to Congress than to effect that result.*" [Emphasis supplied.]

In the face of this clear judicial interpretation limiting the effect of the 1882 proviso, Appellee has argued that the proviso's wording, which—for the limited purpose of federal court *jurisdiction*—made national banks and state banks identical, also served to repeal the *venue* aspects of §94. Note also that the wording of the proviso refers only to jurisdiction. Appellant, however, points out that a statute designed only to constrict federal court jurisdiction cannot have the effect of repealing a provision relating to state court venue. To have a repeal other than express, a *sine qua non* is to have two statutes dealing with the same subject matter. The 1882 proviso and §94 do not deal with the same subject matter. To argue that they do, again, is a consequence of confusing venue and jurisdiction.

The 1882 proviso has now been repealed *(Act of June 25, 1948, ch. 646, §39, 62 Stat. 994)*, but even during its life it could not have had the effect of repealing §94 as Appellee contends. §94 stands today in full force and effect.

C. The effect of Casey v. Adams.

Appellee's last contention is that this is a "local action," and as such comes under the rule of *Casey v. Adams, 102 U. S. 66 (1880)* rendering *12 U. S. C.* §94 inapplicable.

This Appellant has discussed the applicability of *Casey v. Adams* in its previous Brief (pp. 33-35). Appellant's first answer to that contention—again—is that the Texas Supreme Court expressly refused to decide this case on the basis of its being a local action. It said (R. 369, *341 S. W. 2d 164*):

> "It is unnecessary to our decision to determine whether this particular action is local or transitory in nature."

Appellant's second answer is that this is *not* a local action; for further discussion and authorities the Court is respectfully referred to the cited portion of Appellant's previous Brief. One further question, however, deserves comment. What standard do we use in determining what is a local action under the *Casey v. Adams* rule? Appellant knows of no case bearing on that problem. That being true, it must be that we refer to *Casey v. Adams* itself to determine what a local action is. It is certainly more in accord with the federal government's policy toward national banks that we refer to a uniform standard (one federal decision) rather than a diverse one (the rules in various states).

Casey v. Adams indicates first, that an action may be local either by common law or by statute, and second, that local actions "* * * are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." *(102 U. S. at 68.)* A definition of local action

containing both the requirements set out in *Casey v. Adams* is the only one which prevents a state from rendering *12 U. S. C. §94* impotent simply by passing mandatory venue statutes. If the only requirement of a local action were that a state statute make venue mandatory, a state could take any type of action, conceivably one having no resemblance to a true local action, and render it impervious to the requirements of *12 U. S. C. §94* by applying mandatory venue to it. This is not a possibility which the Court in *Casey v. Adams* intended. The Court in *Casey v. Adams* was interested in doing away with the difficulty caused by requiring an *in rem* action to be tried away from the property involved; not in raising an exception which would allow the states to render ineffective the venue requirement for national banks.

We come then, to apply the standard of *Casey v. Adams* to this case. Assuredly there is no basis (other than the Texas venue statute, *Sec. 4(f), Article 21.28, Insurance Code of Texas)* for contending that this vast and complex case, a tort action in conspiracy involving 144 defendants located all over the nation, is local. A local action, even under Texas law, is one which could have arisen in only one place, one involving specific property, one with relief acting directly on the subject-matter, not the person. See *Pegram v. Owens, 64 Tex. 475 (1885); Parker v. Mather, 59 S. W. 2d 961 (Tex. Civ. App. 1933, err. ref.); Texas and Pacific Railway Company v. Gay, 86 Tex. 571, 589, 26 S. W. 599, 605 (1894); Employers' Casualty Company v. Ponton, 41 S. W. 2d 147, 149 (Tex. Civ. App. 1931, no writ history).*

The *Casey v. Adams* standard is a dual one. An action may be local by statute, but to be such it must *also* be "in the nature of" a suit *in rem*. This case does not involve specific property; it is not in the nature of a suit *in rem*; and it is not even being prosecuted where I. C. T. Insurance Company was located. (I. C. T. was headquartered in Dallas County, Texas. See Plaintiff's First Amended Original Petition, R. 12.) This case does not meet the definition of a local action set out in *Casey v. Adams*. For that reason, the exception provided for in that case does not apply.

CONCLUSION

For the reasons herein stated, and for the further reasons contained in its Brief previously submitted, Appellant again respectfully requests that the judgment of the Supreme Court of Texas be reversed, that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas be affirmed, and that venue in this case as to the national banks involved be ordered transferred to Dallas County.

Respectfully submitted,

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PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of February, 1962, I served copies of the foregoing reply brief on appellee by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record for appellee, as follows:

To Cecil C. Rotsch, Esq.,
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To W. E. Cureton, Esq.,
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None of the persons on whom service is to be made resides five hundred miles or more from me.

.....

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